July 22, 2019

Via ECFS

Federal Communications Commission
Office of the Secretary
Marlene H. Dortch
445 12th Street, SW
Washington, DC 20554
Submitted Via FCC's Electronic Comment Filing System

Re: In the Matter of Leased Commercial Access; Modernization of Media Regulation Initiative (MB Docket Nos. 07-42; No. 17-105)

Dear Ms. Dortch:

I write on behalf of Americans for Prosperity ("AFP"), a 501(c)(4) nonpartisan organization that drives long-term solutions to the country's biggest problems.[1] AFP submits these comments in response to the Federal Communications Commission's ("FCC") Report and Order and Second Further Notice of Proposed Rulemaking on Leased Commercial Access ("Second FNPRM").[2] AFP would like to support the FCC's efforts to modernize media regulations and remove unnecessary requirements that can impede free speech, competition, and innovation in the media marketplace.[3]

I. Drastic Marketplace Changes and Innovation Render the Leased Access Regime Obsolete

The "commercial leased access" provisions of Title VI of the Communications Act were initially enacted in 1984 and refined in 1992.[4] Their purpose was clear and explicit: "[t]o promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information services are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."[5] But the very premise of this regulatory regime—that there are insufficient outlets for independent voices—has been completely upended, especially with the advent of the Internet. The video marketplace has

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[1] *See* AMERICANS FOR PROSPERITY *About*, www.americansforprosperity.org/about.

[2] *See Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42 and 17-105, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-52 (adopted June 6, 2019).

[3] *See* Federal Communications Commission, Leased Commercial Access; Modernization of Media Regulation Initiative, 84 Fed. Reg. 28784 (June 20, 2019).

[4] *Cable Communications Policy Act of 1984,* Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 et seq. (1984). The statute was amended by the *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.* (1992).

[5] 47 U.S.C. § 532(a).

experienced an explosion of growth, innovation, and competitiveness. Today, both content producers and public audiences have access to an unprecedented choice of distribution platforms, over-the-air broadcast stations, online video distributors, and the rise and proliferation of user-generated content platforms, such as YouTube, Twitter, and Periscope. In addition, online streaming services, such as Hulu, Netflix, and DirecTVNow have democratized the distribution of video programming.[6] The dramatic innovation-driven shift in how Americans get their content has all but eliminated *any* government interest that may have existed in 1996.

The rule's impact on cable operators' editorial discretion simply can no longer be justified as necessary to further the government's interest in promoting diversity and competition.

II. Current Leased Access Laws Do Not Withstand First Amendment Muster

As the FCC has noted, the U.S. Supreme Court and the D.C. Circuit have long established that leased access provisions and related rules impinge on free speech.[7] In the past, courts have consistently applied heightened First Amendment scrutiny to these types of provisions.[8] In doing so, the government has been mandating cable providers to carry speech they might not otherwise choose to distribute.

But while laws that target specific content are *always* subject to strict scrutiny, it is not the case that laws that are content-neutral are *never* subject to strict scrutiny.[9] Laws that compel a newspaper to publish content that they otherwise would not choose to publish are subject to strict scrutiny and are generally impermissible even where the requirement is content-neutral. The *Turner* decision distinguished cable from newspapers because at the time, the physical connection of cable to subscribers' television sets effectively precluded them from accessing *any* other television programming in their homes.[10] That is, these laws were put in place to disrupt the cable monopoly that existed at the time.

However, drastic changes in the marketplace render this distinction meaningless—none of these technological developments existed at the time of the *Turner* decision. Today, great advances in technology allow households to readily access innumerable content from varied sources, as well as from Internet-delivered video programming services and over-the-air broadcasters. Indeed, even under intermediate scrutiny the leased access rules do not pass First Amendment muster, the conditions on which the D.C. Circuit upheld theses rules in 1996 *no longer*

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[6] Individuals all over the world produce and upload video content that is unprecedented. As just one example, YouTube, Instagram, Twitter and Vimeo enable virtually anyone to distribute programming to *billions* of potential viewers at little to no cost.

[7] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."); *see also Time Warner v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (applying *Turner* in a case bringing a facial challenge to the leased access provisions of the 1992 Cable Act).

[8] *Turner*, 512 U.S. at 641 ("some measure of heightened First Amendment scrutiny is demanded"); *Time Warner*, 93 F.3d at 967-971 (applying *Turner*'s First Amendment framework to leased access requirements).

[9] *See e.g.*, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

[10] *Turner*, 512 U.S. at 656.

exist. The current framework supports baseless intrusion on free speech and also inadvertently functions as arbitrary barrier to innovation and editorial discretion.

III. The Current Rules Have the Unintended Effect of Chilling Protected Speech

Due to dramatic marketplace changes, the leased access provisions are facially unconstitutional. By compelling cable operators to carry content not of their choosing, the laws effectively chill protected commercial speech.

While U.S. Supreme Court jurisprudence currently subjects commercial speech restrictions to "heightened scrutiny," it falls short of providing it strict scrutiny protection (as it does for noncommercial speech). Distinctions between commercial and noncommercial forms of speech are arbitrary and effectively chill the former and punish economically-motivated speakers. Moreover, restrictions on commercial speech deny consumers access to a free flow of valuable information and require the government to adjudicate "truthful" speech.

Current leased access regulations are antiquated remnants that no longer apply to current market realities. Moreover, these rules interfere and suppress the protected speech of cable operators in their editorial discretion. Ironically, it is these same rules that allowed Russia Today to be a chief beneficiary of this current policy. And, these same rules forbid cable companies the discretion to drop Russia Today. In a time when policymakers discuss the problem of foreign intervention in our elections, it is troubling that our own laws are limiting the speech rights of cable companies to compel them to carry Russia Today.[11]

It is clear that the FCC—in its furtherance of its statutory duty to eliminate unnecessary regulations that no longer remain "necessary in the public interest"—is actively accounting for and recognizing the immense changes in the video and media marketplace. We applaud this stance and support the economic liberty of those organizations that have been burdened with the leased access regime mandate. It behooves the FCC to remove these antiquated barriers and to encourage the uninhibited exchange of competing information in the greater marketplace of ideas.

Pursuant to Section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced dockets. Please direct any questions regarding this filing to me. If you have any questions about this request, please contact me by e-mail at ashley.salvino@causeofaction.org. Thank you for your attention to this matter.

/s/ Ashley Salvino
ASHLEY SALVINO
CAUSE OF ACTION INSTITUTE

Counsel for Americans for Prosperity

[11] Shalini Ramachandran, *RT Channel's Unique Carriage Deals Make it Difficult to Drop in U.S.*, Wall St. J. (Jan. 25, 2017), *available at* https://www.wsj.com/articles/rt-channels-unique-carriage-deals-make-it-difficult-to-drop-in-u-s-1485361056 (last visited July 17, 2019).